Supreme Court, U.S.
FILED
SEP 20 1999
CLERK OF THE COURT

No. 99-308

In The

Supreme Court of the United States

DENA' NENA' HENASH a/k/a
TANANA CHIEFS CONFERENCE,

Petitioner,

vs.

CATHERINE N. IPALOOK and
The STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION

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September 20, 1999

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QUESTIONS PRESENTED FOR REVIEW

1. Did the state trial court of first instance rule correctly under state law that TCC had waived any constitutional claim?

2. Does Ipalook's overtime claim against TCC lack national importance?

3. Is the state court decision below consistent with this Court's decisions?

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Sec. 23.10.110 ..... 1, 4, 7, 9, 10

Sec. 23.10.055. 5

Exemptions. The provisions of AS 23.10.050-AS 23.10.150 do not apply to

. . .

(6) an individual engaged in the activities of a nonprofit religious, charitable, cemetery, or educational organization where the employer-employee relationship does not, in fact, exist, and where services rendered to the organization are on a voluntary basis.

Sec. 23.10.140 12

Penalty. An employer who violates a provision of AS 23.10.050-23.10.150, or of any regulation or order of the commissioner issued under it, upon conviction is punishable by a fine of not less than $100 nor more than $2,000, or by imprisonment for not less than 10 nor more than 90 days, or by both. Each day a violation occurs constitutes a separate offense.

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General Rules of Pleading.

. . .

(c) **Affirmative Defenses**. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 16..... 6

Pretrial Conferences; Scheduling; Management.

. . .

(e) **Pretrial Orders**. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

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Rule 37 8

Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

. . .

(b) **Failure to Comply With Order.**

. . .

(2) *Sanctions by Court in Which Action is Pending* . . . if a party fails to obey an order entered under Rule 16(e) . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses . . .

Rule 68 10

Rule 77 8

Motions.

. . .

(k) . . .

(2) The motion for reconsideration shall specifically state which of the grounds for reconsideration specified in the prior subparagraph exists, and shall specifically designate that portion of that ruling, the memorandum, or the record, or that particular authority, which the movant wishes the court to consider. The motion for reconsideration and supporting memorandum shall not exceed five pages.

JURISDICTION

The judgment of the state court of first instance rests on a state-law ground that is both independent of the merits of the federal due process constitutional claim and an adequate basis for the decision of the state court of first instance.

STATUTES INVOLVED IN THIS CASE

Alaska Statutes

Current Law

> **Sec. 23.10.110. Remedies of employee; attorney fees; offers of judgment; settlement; waiver.** (a) an employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and, except as provided in (d) of this section, in an additional equal amount as liquidated damages.
>
> (b) An action to recover from the employer the wages and damages for which the employer is liable may be maintained in a competent court by an employee personally and for other employees similarly situated, or an employee may individually designate in writing an agent or representative to maintain an action for the employee. The consent shall be filed in the court in which the action is brought. At the request of a person paid less than the amount to which the person is entitled under AS 23.10.050 – 23.10.150, the commissioner may take an assignment in trust for the employee of the full

amount to which the employee is entitled under this section and may bring any legal action necessary to collect the claim.

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and, except as provided in (e)-(h) of this section, reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

(d) In an action under (a) of this section to recover unpaid overtime compensation or liquidated damages for unpaid overtime, if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, the court may decline to award liquidated damages or may award an amount of liquidated damages less than the amount set out in (a) of this section.

(e) If the plaintiff prevails in an action for unpaid overtime compensation under (a) of this section, the court shall award reasonable attorney fees to the plaintiff unless the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or

omission was not in violation of AS 23.10.060, in which case

(1) the court may award attorney fees to the plaintiff in accordance with court rules; or

(2) If the defendant would be entitled to attorney fees if the action were subject to the standards under court rule offers of judgment, the court may not award attorney fees to either the plaintiff or the defendant.

(f) If the defendant prevails in an action for unpaid overtime compensation under (a) of this section and had previously made an offer of judgment to the plaintiff, the court shall award attorney fees to the defendant unless the plaintiff proves to the satisfaction to the court that the action was both brought and prosecuted in good faith and that the plaintiff had reasonable grounds for believing that the act or omission was in violation of AS 23.10.060. If the court awards attorney fees to the defendant, the award shall be made in accordance with court rule.

(g) Failure to inquire into Alaska law is not consistent with a claim of good faith under this subsection.

(h) Subsections (d)-(g) of this section do not apply to an action brought under this section by the commissioner.

(i) The commissioner may supervise the payment of the unpaid overtime compensation owing to an employee under AS 23.10.060. Payment in full in accordance with an agreement by an employee to settle a claim for unpaid overtime compensation or liquidated damages for unpaid overtime compensation constitutes a

waiver of any right as to this claim the employee may have under (a) of this section to unpaid overtime compensation or liquidated damages for unpaid overtime compensation.

(j) In a settlement for unpaid overtime compensation that is not supervised by the department or the court, an employee is entitled to liquidated damages under (a) of this section unless the employee and the employer enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. A private written settlement agreement under this subsection is not valid unless submitted to the department for review. The department shall review the agreement and approve it if it is fair to the parties. The department shall approve or deny an agreement within 30 days of receipt. A waiver of liquidated damages may not be a condition of employment.

(Amended by Laws 1995, c. 37, §§ 1 to 3, eff. Aug. 22, 1995.)

Before the 1995 Amendments

Sec. 23.10.110. Remedies of employee. (a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

(b) An action to recover from the employer the wages and damages for which the employer is liable may be maintained in a competent court by an employee personally and for other employees similarly situated, or an employee

may individually designate in writing an agent or representative to maintain an action for the employee. The consent shall be filed in the court in which the action is brought. At the request of a person paid less than the amount to which the person is entitled under AS 23.10.050 – 23.10.150, the commissioner may take an assignment in trust for the employee of the full amount to which the employee is entitled under this section and may bring any legal action necessary to collect the claim.

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action. (§ 9(2) ch 171 SLA 1959)

STATEMENT OF THE CASE

In 1995 Respondent Catherine Ipalook ("Ipalook") filed a wage and hour complaint under the Alaska Wage and Hour Act ("AWHA") against her former employer Petitioner Tanana Chiefs Conference, Inc., a state of Alaska non-profit corporation ("TCC")[1]. Resp. App. 1-4.

[1] AWHA applies to a non-profit Alaskan corporation like TCC. AS 23.10.055(6).

Ipalook's suit claimed unpaid overtime under AWHA ("AWHA") provisions in place before AWHA amendments which took effect on August 22, 1995. Pet. App. 44.

TCC raised an affirmative defense of good faith in its original answer; in response to Ipalook's motion to strike, TCC withdrew its good faith defense. Resp. App. 5.

TCC filed counterclaims against Ipalook in its later amended answer, claiming Ipalook breached duties as a former President of TCC. Pet. App. 39-41; 44-46; Resp. App. 14-20. TCC included no defense or claim of good faith or unconstitutionality in its amended answer. Resp. App. 14-20. Ipalook filed a third-party complaint. Resp. App. 21-24. Ipalook who replied to TCC's counterclaims. Resp. App. 25-30.

The state trial court filed a civil pretrial order under Ak. R. Civ. P. 16(e). Resp. App. 6-12. TCC filed a pretrial brief. Resp. App. 33-44. TCC's pretrial brief included no defense or claim of good faith or unconstitutionality. Resp. App. 33-44.

Following trial, Ipalook prevailed on her overtime claim. Pet. App. 44. Ipalook also prevailed on her third-party claim. Pet. App. 45-46. TCC's counterclaims against Ipalook failed. Pet. App. 39-41; 44-46.

At a hearing following trial but before entry of judgment, the state trial court ruled that TCC had not timely raised, and thus waived, any constitutional issue. Resp. App. 67-68. The state trial court also clarified that its finding of statutory good faith was not a finding of good faith under amended AWHA provisions taking effect on August 22, 1995. Resp. App. 69-70.

TCC appealed the judgment to the Alaska Supreme Court; Ipalook cross-appealed. TCC lost its appeal; Ipalook prevailed on her cross-appeal. Pet. App. 1-23.

Ipalook's case is presently remanded back to the trial court, pursuant to the mandate of the Alaska Supreme Court. Pet. App. 23.

ARGUMENTS FOR DENYING THE PETITION

A. Summary

First, the waiver ruling by the state court of first instance is an adequate and independent ground, based on state law, to affirm the state decision. Second, the issue is not sufficiently important to warrant this Court's attention. Third, this Court's own prior decisions are controlling.

B. Arguments

1. The Federal Due Process Question Presented By Petitioner TCC Was Not Timely Raised Or Preserved Under State Law In The State Court Of First Instance

During final arguments on April 4, 1997, TCC raised a "reverse relation back" AWHA statutory argument based upon amended AS 23.10.110. Resp. App. 45-49. The trial court ruled that TCC could file a motion for reconsideration on that specific issue. Resp. App. 48-49. On

April 28, 1997 TCC filed an overlength pleading[2] which included a due process constitutional argument. Resp. App. 50-60. Ipalook opposed that portion of TCC's pleading, arguing that a constitutional claim had not been raised in TCC's pleadings, nor at trial, and was untimely and waived. Resp. App. 61-66. On May 20, 1997 the state trial court ruled that TCC's constitutional claim was untimely and waived. Resp. App. 67-68. The state court's ruling was firmly based upon state law. A. R. Civ. P. 8(c); 16(e); 37(b)(2)(B).

2. Ipalook's Overtime Claim Against TCC Under Former State Law Lacks National Importance

Ipalook's overtime claim against TCC, arising under the AWHA, lacks national importance. TCC's unsuccessful counterclaims against Ipalook, as a former President of TCC, and Ipalook's third-party complaint, highlight the local and factual nature of the disputes between Ipalook and TCC. The only real questions TCC raises in its Petition turn on the particular facts of the case alone and are of interest only to the parties to it.

The factual issues have already been resolved twice in Ipalook's favor, without any impact outside the limits of the case itself. The court should decline TCC's petition because of the lack of national importance arising out of Ipalook's state overtime claim against TCC and TCC's unsuccessful counterclaims against Ipalook.

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[2] A.R.Civ.P. 77(k)(2) limits a motion for reconsideration to five pages. TCC's motion for reconsideration was twice that length. Resp. App. 50-60.

3. The State Court Decision Adopted A Long-Respected Doctrine In Considering The Issue Below

After trial but before entry of judgment in the state court of first instance, Ipalook also filed a contingent opposition to TCC's due process constitutional claim. Pet. App. 62-65. Ipalook cited and relied upon *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682 (1942) (*"Missel"*)[3] for the proposition that mandatory exaction of liquidated damages for violation of wage and hour provisions is not violative of due process of law. Pet. App. 62. In reply TCC referenced the holding in *Missel* as follows:

> TCC does not contest that holding, nor that characterization of the holding. Pet. App. 66.

The Alaska Supreme Court expressly cites to *Missel* in upholding former AS 23.10.110(a):

> We . . . hold, as the Supreme Court did in *Missel*, that the mandatory award of liquidated damages does not violate due process. Pet. App. 12.

Prior to the 1995 amendment to AS 23.10.110, Alaskan courts awarded mandatory liquidated damages to claimants who prevailed in their claim for overtime wages. *Alaska Int'l Industries v. Musarra*, 602 P.2d 1240 (Alaska 1979) and *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska 1991).

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[3] The *Missel* court cited and referred to *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 9 S.Ct. 207, 32 L.Ed. 585 (1889); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 6 S.Ct. 110, 29 L.Ed. 463 (1885), and *Kansas City Southern R. Co. v. Anderson*, 233 U.S. 523, 34 S.Ct. 599, 58 L.Ed. 983 (1914).

TCC claims incorrectly that "Alaska has a (sic) unique wage and hour law".[4] Petition, 5. Former AS 23.10.110(a) is not unique. Besides Alaska, other state courts have enforced applicable mandatory liquidated damages provisions requiring employers to pay a penalty in the amount equal to the employee's unpaid, outstanding overtime compensation and other wages. See *Rosebud County v. Roan*, 627 P.2d 1222, 1228 (Montana 1981) ["(t)his statute leaves no discretion to determine whether the employer was in good faith, because even if the employer was in good faith, the finding of a violation requires imposition of the penalty"]; *Purdy v. Community Telecommunications*, 663 A.2d 25, 29 (Maine 1995) [holding that under state statute the employee was entitled to additional amount equal to twice the amount of unpaid wages plus interest, reasonable attorney fees, and costs]; *Cooper v. Springfield Terminal Railway*, 635 A.2d 952, 955 (Maine 1993) [holding that employer's violation of state wage statute entitled the employee to unpaid wages, liquidated damages, costs and attorney's fees]; *Gilbert v. Moore*, 697 P.2d 1179, 1183 (Idaho 1985) [holding that an award of statutory mandatory damages three (3) times the amount of actual unpaid recoverable wages does not first require a showing of bad faith on the part of the

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[4] TCC also claims that the state trial court "applied a penal interest rate of 15.5%" for TCC's failure to accept Ipalook's settlement offer. Petition, p.7 n.5. The court properly applied provisions of former AS 09.30.065, Alaska's offer of judgment statute, and A.R. Civ. P. 68., Alaska's offer of judgment rule. Resp. App. 69. *See Home Indem. Co. v. Lane Powell Moss and Muller*, 43 F.3d 1322, 1332 (9th Cir. 1995). TCC has never contested former AS 09.30.065 or A.R. Civ. P. 68.

employer]; *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510 (Indiana App. 1991) [holding that worker who was not paid prevailing wage for work on public works project was entitled to recover three (3) times the wages due under state statute]; *Fardy v. Physicians Health Rehab. Svcs., Inc.*, 529 N.E.2d 879, 882-883 (Indiana App. 1988) [holding that the employee was entitled to total award of three (3) times the wages due plus an award of reasonable attorney fees under state statute].[5]

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[5] *Hale v. Morgan*, 584 P.2d 512 (Calif. 1978) ("*Hale*") is legally and factually distinguishable. *Hale* does not involve mandatory liquidated damages under a state wage and hour statute. *Hale* was later distinguished in its own state jurisdiction on factual grounds in *Kinney v. Vaccari*, 612 P.2d 877, 878, 882 (Calif. 1980).

CONCLUSION

The Court should deny TCC's petition for writ of certiorari[6].

Respectfully submitted,

JAMES M. HACKETT
Counsel of Record for Respondent
Catherine N. Ipalook
JAMES M. HACKETT, INC.
ATTORNEY AT LAW
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Fairbanks, Alaska 99701
(907) 456-3626

September 20, 1999

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[6] TCC incorrectly contends that under AS 23.10.140, its maximum potential criminal fine for failing to pay overtime wages would be no more than $2000; and thus a liquidated damage award greater than $2000 is excessive when compared to the maximum fine of $2000. Petition 8 n. 6. TCC ignores that AS 23.10.140 provides that "(e)ach day a violation occurs constitutes a separate offense." Therefore, TCC could be fined a maximum of up to $2000 per day for each day TCC was in violation during Ipalook's employment between June 19, 1994 and August 18, 1995. Pet. App. 26. TCC's maximum potential criminal fine under AS 23.10.140 for this period is in the approximate range of $600,000 to $700,000.

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Tanana Chiefs Conference, Inc.
Articles of Incorporation
By-Laws

* * *

Dena' Nena' Henash

1996 Version

ARTICLES OF AMENDMENT

to the

ARTICLES OF INCORPORATION

of

DENA' NENA' HENASH
(Tanana Chiefs Conference, Inc.)

Pursuant to the provisions of the Alaska Non-Profit Corporations Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation:

FIRST: The name of the corporation is DENA' NENA' HENASH, (Tanana Chiefs Conference, Inc.)

SECOND: The following amendment of the Articles of Incorporation was adopted by the Board of Directors and Members of the corporation on October 20, 1975, in the manner prescribed by the Alaska Non-Profit Corporation Act:

AMENDMENT

EIGHTH: No part of the net earnings of the corporation shall inure to the benefit of, or be distributed to, its members, trustees, officers,

or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article Three hereof. Notwithstanding any other provision of these articles, this corporation shall not except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes of this corporation.

THIRD: The following statements comply with Alaska Statutes Section 10.20.181.

All members of the Board of Directors and all Members of the Corporation are entitled to vote on all Amendments to the Articles of Incorporation.

On the date of October 20, 1975, the above listed Amendment was adopted by a quorum of Board of Directors and Members of the Corporation. The above listed Amendment received 100% of the votes cast of the Board of Directors and Members of the Corporation present at this meeting.

DATED: October 20, 1975. DENA' NENA' HENASH
(Tanana Chiefs Conference, Inc.)

By: /s/ Melvin Charlie
(its President)
Melvin Charlie

and

/s/ Flora Bergman
[Illegible]

State of Alaska

[Seal]

Department of Commerce and Economic Development

Certificate

The undersigned, as Commissioner of Commerce and Economic Development of the State of Alaska, hereby certifies that duplicate originals of Articles of Amendment to the Articles of Incorporation of DENA' NENA' HEMASH

duly signed and verified pursuant to the provisions of the Alaska Nonprofit Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as Commissioner of Commerce and Economic Development, and by virtue of the authority invested in him by law, hereby issues this Certificate of Amendment to the Articles of Incorporation of

DENA' NENA' HENASH

and attaches hereto a duplicate original of the Articles of Amendment.

[Seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand affixed my official seal, at Juneau, the Capitol, this 23rd *day of* April *A.D. 1979*

/s/ Charles R. Webber
CHARLES R. WEBBER
COMMISSIONER OF
COMMERCE AND
ECONOMIC
DEVELOPMENT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
Fourth Judicial District at Fairbanks

CATHERINE N. IPALOOK,

Plaintiff,

v.

DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,

Defendant.

_____/

Case No. 4FA-95-2745 Civ

WITHDRAWAL OF CERTAIN DEFENSES AND PARTIAL NONOPPOSITION TO MOTION TO [STRIKE]

(Filed Mar. 12, 1996)

Tanana Chiefs Conference, Inc., responds to the plaintiff's motion to strike, served January 17, 1996.

Tanana Chiefs Conference withdraws the following two affirmative defenses which appear in its Answer: #3, relating to good faith compliance with the Alaska wage and hour laws; and #6, relating to an offset for the value of room and board provided to plaintiff.

Tanana Chiefs Conference seeks to reserve the right to move to amend its pleadings, as provided by pretrial order, to raise additional defenses if warranted by case law or statute.

An appropriate order accompanies this pleading.

Dated: March 11, 1996.

TANANA CHIEFS CONFERENCE, INC.

/s/ Mark Andrews

MARK ANDREWS
Associate Counsel

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

CIVIL PRETRIAL ORDER

(Filed Mar. 15, 1996)

TRIAL. This matter is set for a COURT trial on the week of: 120996. Trial is estimated to take (6) days. TRIAL TIME 8:15 AM – 1:15 PM.

1. ***DUE DATES.***

Disclosure Civil R. 26(1):	040496
Joinder of Parties:	061296
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Pretrial Conference:	112996 at 2:30 p.m.
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Reply to Objections to Depositions:	112796

2. *INITIAL DISCLOSURE.*

Unless previously made, on or before the date set forth in paragraph 1, the [parties] shall comply with Civil R. 26(1).

3. *EXPERT WITNESSES.*

(a) *Disclosure.* On or before the date set forth in paragraph 1, the parties shall comply with Civil R. 26(2).

(b) *Expert Witness Lists.* On or before the date set forth in paragraph 1 the parties shall file and serve a list of expert witnesses showing the names, current mailing addresses, physical addresses, telephone numbers, and area of expertise of expert witnesses which the party actually intends to call at the trial.

4. ***OTHER WITNESSES.***

(a) *Disclosure.* On or before the date set forth in paragraph 1, the parties shall comply with Civil R. 26(3).

(b) *Other Witness Lists.* On or before the date set forth in paragraph 1, the parties shall file and serve a list of witnesses showing the names, current mailing and physical addresses, and telephone numbers of all witnesses other than expert witnesses which the party actually intends to call at the trial.

5. ***DISCOVERY.*** Shall be pursuant to Civil R. 26 and shall be completed by the date set forth in paragraph 1.

Limits on Discovery: No change from Rule.

6. ***EXHIBITS.*** Exhibits will be handled pursuant to Administrative Bulletin No. 9, Civil R. 43.1, and as follows:

(a) Parties shall exchange exhibits on or before the date set forth in paragraph 1.

(b) An original and one copy of the exhibit list shall be filed with the court the first day of trial.

7. ***JOINDER OF PARTIES.*** On or before the date set forth in paragraph 1, motions to join other parties must be filed.

8. ***AMENDMENTS TO PLEADINGS.*** On or before the date set forth in paragraph 1, motions to amend pleadings must be filed.

9. ***PRETRIAL MEMORANDA***. On or before the date set forth in paragraph 1, the parties shall file and serve a pretrial memorandum covering the following matters:

(a) *Trial Brief.* This shall contain the following:

(1) A short, plain and candid statement of each contested issue of fact which remains to be litigated.

(2) A short, plain and candid statement of each contested issue of law which remains to be litigated.

(3) A short, plain and candid statement of the facts of the case.

(4) A legal brief supporting the party's position as to each contested issue of law stated in paragraph (2) above, and each question of law or evidence which the party should reasonably anticipate may arise during the course of the trial.

(b) *Objections to Documents and Exhibits.*

(1) The objection shall identify the document or exhibit by the exhibit number or letter; and

(2) Shall set forth a clear statement of the objection, together with a citation to the Alaska Rule of Evidence relied on and citation of authority.

(3) Documents and exhibits to which no objection is made shall be admitted at trial.

(c) *Stipulations.* The parties shall specify those relevant facts admitted in pleadings,

requests for admissions or other records on file for which no proof need be offered at trial.

(d) *Depositions.* For each witness whose testimony is to be presented by deposition, the proponent of the testimony shall specifically designate those portions which are proposed to be read or shown, by page and line. Objections and counter designations are to be filed, as set forth in paragraph 14.

10. ***JURY INSTRUCTIONS.*** If the trial is a jury trial, the parties shall file and serve proposed instructions on or before the date set forth in paragraph 1. The parties need not file standard instructions. *IF A PARTY FAILS TO SUBMIT JURY INSTRUCTIONS IN COMPLIANCE WITH THIS ORDER, THE COURT MAY IMPOSE APPROPRIATE SANCTIONS AGAINST THAT PARTY, INCLUDING THE AWARD OF ATTORNEY'S FEES, FINES, THE PRECLUSION OF EVIDENCE, OR THE DENIAL OF A JURY TRIAL.*

The parties are to submit two sets of instructions with citations to appropriate authority on each. Each proposed instruction must be consecutively numbered, with a heading denoting the party proposing the instruction and its number.

11. ***OBJECTIONS TO INSTRUCTIONS.*** On or before the date set forth in paragraph 1, any objections to proposed jury instructions shall be filed.

(a) Each objection to a tendered instruction shall identify the instruction by proponent and its number and shall set forth separately and specifically a clear statement of any objection.

(b) following the objection there shall be listed a citation of authorities in support thereof.

(c) Instructions to which no objection is made shall be used at trial unless insufficient evidence is produced to support the instructions.

12. ***MOTIONS.*** -

(a) *Dispositive Motions.* Shall be filed on or before the date set forth in paragraph 1.

(b) *Other Motions.* Including motions *in limine* and motions for protective orders, shall be filed on or before the date set forth in paragraph 1.

(c) *Procedure.* The provisions of Civil Rule 77 shall govern the filing of any motion filed under this paragraph.

13. ***SETTLEMENT CONFERENCE.*** Any motion for a settlement conference shall be filed on or before the date specified in paragraph 1. Any stipulation for settlement conference shall be filed no later that 21 days after the state specified in paragraph 1 for filing a settlement conference motion. The parties shall specify whether they request the settlement conference be before the assigned trial judge or another judge.

The procedure for the settlement conference shall be determined by the settlement conference judge.

14 ***DEPOSITIONS.*** Trial use of depositions shall be governed by Civil Rule 32. Objections to the use of any deposition shall be filed on or before the date specified in

paragraph 1 and be in conformity with Civil R. 26(3). Replies to the objections or counter designations shall be filed on or before the date set forth in paragraph 1.

15. ***PRETRIAL CONFERENCE.*** A pretrial conference shall be held on the date and time set forth in paragraph 1.

16. ***SERVICE OF FILINGS.*** Pretrial Memoranda, Objections and Reply to Objections to Depositions, Jury Instructions, Objections to Instructions and Exhibits must be served in a manner which will allow receipt by all parties by the date of filing set forth in paragraph 1.

17. ***OTHER.***

IT IS HEREBY ORDERED that this order shall govern the conduct of pretrial and trial of this case and that it shall not be amended except by order of the court to prevent manifest injustice.

DATED this 15 day of March, 1996, at Fairbanks, Alaska.

/s/ Jay Hodges
JAY HODGES
Superior Court Judge

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH, a/k/a
TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

ORDER GRANTING LEAVE TO FILE AMENDED ANSWER

(Filed Jul. 17, 1996)

WHEREAS, the Plaintiff having filed a motion for leave to amend its answer in the above captioned cause, and the Court being aprised of the premises therein,

IT IS HEREBY ORDERED that leave to file TCC's amended answer in the above captioned case is here GRANTED.

DATE: 7/17/96

/s/ [Illegible]
JUDGE

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,	)
Plaintiff,	)
vs.	)
DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC.	)
Defendant.	)

Case No. 4 FA-95-2745

AMENDED ANSWER

(Filed Jul. 17, 1996)

The Defendant, Tanana Chiefs Conference, Inc., answers the paragraphs of the complaint as follows:

COUNT I

1. Admit that Catherine N. Ipalook was employed by TCC from June 1994 to August 1995. "All times pertinent" is a statement of law to which no answer is required.

2. Deny; plaintiff's employment as Patient Hostel Manager at TCC might have begun on June 20, 1994, not June 13, 1994.

3. Admit the rate of compensation, but deny any inference that plaintiff was an hourly wage employee;

state further that there are some other benefits to the position besides housing.

4. Deny; plaintiff's employment at Tanana Chiefs Conference ended August 18, 1995, not August 19, 1995.

5. Defendant is without knowledge or information sufficient to admit or deny the statements of this paragraph, and thus this paragraph is denied.

6. Defendant is without knowledge or information sufficient to admit or deny the factual statements of this paragraph, and thus this paragraph is denied. The claim that plaintiff is entitled to additional compensation is a statement of law to which no answer is required; to the extent that an answer is required, this paragraph is denied.

7. This paragraph is a statement of law, to which no answer is required. To the extent an answer is required, this paragraph is denied.

COUNT II

8. TCC responds to this paragraph as stated in earlier paragraphs.

9. Admit that TCC failed to pay Ipalook her accrued personal leave within three days of her leaving TCC, but state further that TCC otherwise paid timely all that it owed to Ipalook upon her departure. Deny further that any penalty is owed to plaintiff. This paragraph is otherwise denied, or is a statement of law to which no answer is required.

10. This paragraph is a demand, and states no facts. To the extent that it is a statement of law, no answer is required; to the extent that it states facts, this paragraph is denied.

Any statement not admitted is denied. The defendant prays that the plaintiff take nothing by her complaint.

DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. Plaintiff's employment was exempt from the pertinent wage and hour laws of the State of Alaska. These exemptions include, but might be not limited to, the following: plaintiff was a supervisory, executive, or administrative employee; plaintiff was the employee of a hospital whose employment included the provisions of medical services.

3. Plaintiff's claim is barred by estoppel, in that the Plaintiff, in her prior position as President of Tanana Chiefs Conference, Inc., a corporate officer of the Defendant, between March 1990 and March 1991, operated the TCC Patient Hostel in the same manner as provided during her tenure as Hostel Manager, including the conditions of employment for the Hostel Manager, and by her actions or inaction in the former capacity, gave cause to the conditions of her later employment.

4. Plaintiff has failed to mitigate her damages, if any.

5. Other defenses as may be developed by discovery.

ALTERNATIVE COUNTERCLAIM NO. 1
(Breach of Fiduciary Duty)

1) Catherine Ipalook, Plaintiff in the above captioned proceeding, was the President of Tanana Chiefs Conference, Inc. between March 1990 and March 1991, and served as the Chief Executive Officer of TCC during this period.

2) The president of Tanana Chiefs Conference, Inc. is an officer of the corporation owing a fiduciary duty to the corporation to exercise reasonable care in the conduct of TCC business.

3) While the President of Tanana Chiefs Conference Inc., Ms. Ipalook, Tanana Chiefs Conference, between March 1990 and March 1991, TCC operated the TCC Patient Hostel and the Paul Williams House, a residential mental health facility.

4) While Plaintiff was the President of Tanana Chiefs Conference between March 1990 and March 1991, TCC maintained a position of manager of the Paul Williams House and the position of manager of the TCC Patient Hostel as salaried positions exempt as to the payment of overtime.

5) While Plaintiff was the President of Tanana Chiefs Conference between March 1990 and March 1991, Plaintiff did not take any steps to reclassify the manager positions for the Paul Williams House and TCC Patient Hostel from exempt to non-exempt positions.

6) The failure to act as indicated in the above paragraph was unreasonable and exposed TCC to liability in violation of the Plaintiffs duty of care as an officer of TCC.

7) As a result of Plaintiff's conduct stated herein, TCC sustained damages in an amount equal to any valid claim that the Plaintiff may be awarded in the above captioned matter.

8) As a result of Plaintiff's conduct stated herein, TCC sustained damages in an amount equal to any valid claim that the third parties may be awarded in any subsequent matters.

ALTERNATIVE COUNTERCLAIM NO. 2
(Breach of Duty to Disclose)

9) Incorporate by reference the allegations contained in paragraphs' 1-8 of the Counterclaims stated above.

10) That during Ms. Ipalook's employment as the Patient Hostel Manager, Ms. Ipalook, as a former president of Tanana Chiefs Conference, Inc., had a continuing duty to timely disclose any information which she believed could incur liability to TCC arising out of any affirmative actions or act of omission as President.

11) Ms. Ipalook did not disclose to TCC that she considered the Patient Hostel Manager to be a non-exempt position.

12) The failure of Ms. Ipalook to disclose information creating liability to TCC caused damages to TCC in an amount to be determined at trial.

ALTERNATIVE COUNTERCLAIM NO. 3
(Retained Records: Violation of Privacy Act, Fraud Upon Employer, and Violation of Employee Duty.)

13) Incorporate by reference the allegations contained in paragraphs' 1-12 of the Counterclaims stated above.

14) That as Patient Hostel Manager, Ms. Catherine Ipalook converted TCC files to her personal possession for such uses currently unknown to TCC.

15) Such files are confidential patient files of beneficiaries of the U.S. Indian Health Service, subject to the confidentiality provisions of the Federal Privacy Act, [5 USC § 552a].

16) Upon her termination from TCC, Ms. Ipalook signed a statement stating that she had returned all files to TCC, which constitutes a fraud upon TCC, her employer.

17) The retaining of such records violates the Federal Privacy Act.

18) The retaining of such records violates TCC personnel manual, and thus a condition of employment and the employee's duty of the fidelity to TCC.

19) Such actions stated above, created lability for TCC to IHS beneficiaries and damages in an amount to be determined at trial.

WHEREFORE, TCC requests dismissal of the Claims against TCC, and demands judgment on the Counterclaims against Catherine Ipalook in an amount equal to

the damages proven at trial, and injunctive relief against Ms. Ipalook to return all copies of retained documents.

Dated: JUNE 12, 1996.

MICHAEL J. WALLERI

/s/ Michael J. Walleri
General Counsel
TANANA CHIEFS CONFERENCE
ABA #7906060

Certificate of Service

I hereby certify that a copy of this Answer was sent by courier to James Hackett, Esq., this 12th day of June, 1996.

/s/ Trudy Oyen
Trudy Oyen

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-8626

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,

Third Party-Plaintiff,

vs.

MR. WILL MAYO, President, Tanana Chiefs Conference, Inc.; MS. KATHERINE A. STRLE, Personnel Officer, Tanana Chiefs Conference, Inc.; AND JOHN DOES, 1-3,

Third Party-Defendants.

Case No. 4FA-95-2745 Civil

THIRD-PARTY PLAINTIFF CATHERINE N. IPALOOK'S THIRD-PARTY COMPLAINT

(Filed Aug. 12, 1996)

COMES NOW Third-party Plaintiff Catherine N. Ipalook ("Ipalook"), by and through counsel, and pursuant to Civil Rule 14(b), files the following third-party complaint against the following Defendants/Third Party Defendants in response to Defendant TCC's counterclaims nos. 1 and 2:

Count 1
Will Mayo as TCC President

1. Defendant/Third Party Will Mayo ("Mayo") has been President of Defendant Tanana Chiefs Conference, Inc. ("TCC") since March 1993 to present.

2. Mayo was President of TCC during the time Ipalook was employed by TCC as a Patient Hostel employee.

3. To the extent that TCC's counterclaim no. 1 (breach of fiduciary duty) and counterclaim no. 2 (breach of duty to disclose) states a cause or causes action, and (her) have any merit, Ipalook alleges that Mayo is a proper indispensable party to those asserted counterclaims.

4. There is an actual case or controversy, between Ipalook and TCC concerning whether TCC's counterclaims nos. 1 and 2 against Plaintiff have merit given the fact that several years elapsed between the time that Ipalook was a President of TCC and the time she was later employed as a Patient Hostel employee, and/or whether all indispensable parties have been named and identified by TCC regarding such counterclaims.

5. Ipalook requests indemnification and contribution from Mayo, to the full extent that TCC's counterclaims no. 1 and no. 2 has (have) merit, if any.

Count 2
Kathryn Strle as TCC Personnel Manager

6. Ipalook incorporates herein by reference Paragraphs nos. 1-4 set forth above.

7. Defendant/Third Party Kathryn Strle ("Strle") as been personnel officer/payroll supervisor at TCC since September 1993 to present.

8. Strle was TCC's personnel officer during the time Ipalook was employed by TCC as a Patient Hostel employee.

9. Part of Strle's responsibilities have included TCC personnel functions.

10. To the extent that TCC's counterclaim no. 1 (breach of fiduciary duty) and counterclaim no. 2 (breach of duty to disclose) state a cause or causes of action, and (has) have any merit, Ipalook alleges that Strle is a proper indispensable party to those asserted counterclaims.

11. Ipalook requests indemnification and contribution from Strle, jointly and severally with Mayo, to the full extent that TCC's counterclaims nos. 1 and 2 (has) have merit, if any.

Count 3
John Does 1-3

12. Ipalook incorporates by reference Paragraphs nos. 1-10 set forth above.

13. To the extent that other TCC employees or supervisors, herein denominated as John Does, 1-3, (was) were responsible for properly classifying TCC's employment positions under the Alaska Wage and Hour Act ("AWHA") during the time of Ipalook's employment as a Patient Hostel employee with TCC, Ipalook requests indemnification and contribution, jointly and severally, together with Will Mayo and Kathryn Strle, from such

John Does 1-3, to the full extent that TCC's counterclaims nos. 1 and 2 (has) have merit, if any.

WHEREFORE Third-Party Plaintiff Ipalook prays for an appropriate judgment, including an appropriate declaratory judgment or judgments, whether or not TCC's counterclaims nos. 1 and 2 are legally sufficient and have identified all indispensable persons thereto; Ipalook further prays for full indemnification and contribution from all responsible Third-Party Defendants as to TCC's counterclaims nos. 1 and 2 to the extent such counterclaims have any merit; and further prays for reasonable costs and attorney's fees.

DATED at Fairbanks, Alaska this 8 day of August, 1996.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
ATTORNEY FOR
THIRD-PARTY PLAINTIFF

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH
a/k/a TANANA CHIEFS
CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

PLAINTIFF'S AFFIRMATIVE DEFENSES AND AMENDED REPLY TO DEFENDANT'S COUNTERCLAIMS

(Filed Aug. 29, 1996)

COMES NOW, Plaintiff Catherine N. Ipalook, by and through counsel and files the following affirmative defenses and replies to Defendant's denominated alternative counterclaims as follows:

Affirmative Defenses

1. One or more or all of Defendant's denominated alternative counterclaims fails to state a claim upon which relief can be granted.

2. One or more or all of Defendant's denominated alternative counterclaims fall outside the jurisdiction of the state judiciary.

3. One or more or all of Defendant's denominated alternative counterclaims are(is) untimely compulsory counterclaims barred by applicable statute(s) of limitations.

4. One or more or all of Defendant's denominated alternative counterclaims constitute compulsory counterclaims which should have been included in Defendant's original pleading, and are(is) waived by having failed to be so included.

5. One or more or all of Defendant's denominated alternative counterclaims fail(s) because of failure of alleged affected persons to exhaust available administrative remedies.

6. Defendant has failed to join one or more indispensable parties, including but not limited to past and present TCC President Will Mayo, past and present Personnel Directors, past and present health department supervisors, and past and present inhouse TCC attorneys.

7. Defendant has failed to allege the circumstances constituting alleged fraud with particularity.

8. Defendant has failed to specifically state items of special damage(s), and has otherwise claimed speculative damages.

9. One or more or all of Defendant's counterclaims fails because of the doctrines of estoppel, and/or waiver, and/or superseding intervening cause or causes.

10. Defendant TCC lacks the standing and/or the capacity to bring one or more or all of Defendant TCC's asserted counterclaims.

11. Plaintiff Ipalook has an absolute litigation privilege, or an applicable conditional litigation privilege, which defeats one or more or all of Defendant TCC's asserted counterclaims.

Reply To Alternative Counterclaim No. 1

1. Plaintiff admits Paragraph no. 1;

2. Plaintiff admits that as President she owed a fiduciary duty to the corporation. Plaintiff states that she discharged that duty. Plaintiff otherwise denies Paragraph no. 2;

3. Plaintiff denies that she as President "operated" the TCC Patient Hostel. Plaintiff admits that the corporation operated entities known as the TCC Patient Hostel and the Paul Williams House during the time she was President. Plaintiff otherwise denies Paragraph no. 4;

4. Plaintiff denies Paragraph no. 4 based upon lack of knowledge;

5. Plaintiff admits she undertook no specific personnel actions while President, because personnel actions did not come before the Executive Board while she was President. Plaintiff otherwise denies Paragraph no. 5 based upon lack of information;

6. Plaintiff denies Paragraph no. 6;

7. Plaintiff denies Paragraph no. 7, which is in any event a legal argument not calling for any specific response from Plaintiff;

8. Plaintiff denies Paragraph no. 8, which is in any event a legal argument not calling for any specific response from Plaintiff;

Reply To Alternative Counterclaim No. 2

9. Plaintiff incorporates her answers to Paragraphs 1-8 above herein;

10. Plaintiff denies Paragraph no. 10, which Paragraph is in reality in any event a legal argument which calls for no specific response from Plaintiff. Further, such paragraph is premised upon a false assumption, namely that any liability by Defendant corporation for Plaintiff's later employment as TCC Patient Hostel Manager somehow arose "out of any affirmative actions or act of omission" by Plaintiff as President some years previously;

11. Plaintiff admits she undertook no specific personnel actions while President, because personnel actions did not come before the Executive Board while she was President. Plaintiff otherwise denies Paragraph no. 11 as based upon a fact of which she has(had) no knowledge or information;

12. Plaintiff denies Paragraph no. 12, which in reality in any event is a legal argument which requires no specific response from Plaintiff;

Reply To Alternative Counterclaim No. 3

13. Plaintiff incorporates her answers to Paragraphs 1-12 herein by reference;

14. Plaintiff admits she copied some whited-out documents, none of which documents constituted "TCC files", for litigation purposes, which documents have, or will have been, produced to Defendant in this lawsuit. Plaintiff otherwise denies Paragraph no. 14;

15. Plaintiff denies Paragraph no. 15, and specifically denies that any whited-out documents produced in this litigation, which whiting out obliterated the identities of any person, constitute or constituted any "confidential patient files";

16. Plaintiff denies Paragraph no. 17 based upon lack of information, and alternatively based upon the fact that Paragraph no. 17 assumes that Plaintiff had not, and did not, return all files to TCC, and that somehow Plaintiff's conduct constituted "a fraud" upon Defendant;

17. Plaintiff denies Paragraph no. 17 based upon lack of information, and alternatively upon the ground that Paragraph no. 17 calls for a legal conclusion on Plaintiff's part;

18. Plaintiff denies Paragraph no. 18;

19. Plaintiff denies Paragraph no. 19;

Wherefore Plaintiff prays that Defendant take nothing by way of Defendant's alternative counterclaims; that Defendant's counterclaims be dismissed or denied; and that Plaintiff be awarded either reasonable attorney's fees, or actual attorney's fees, for having to defend

against Defendant's ill-founded counterclaims brought in bad faith against Plaintiff.

DATED at Fairbanks, Alaska this 13 day of August, 1996.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was hand delivered via Due Process courier service on Michael Walleri, Tanana Chiefs Conference Legal Department, this 13 day of August, 1996.

/s/ Jessica J. Koloski
Jessica J. Koloski

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH a/k/a TANANA CHIEFS CONFERENCE,
Defendant.

Case No. 4FA-95-2745 Civil

ORDER

(Filed Dec. 17, 1996)

The court being fully advised upon the premises, and upon the stipulation of the parties,

IT IS HEREBY ORDERED that the *CIVIL PRETRIAL ORDER* dates are modified and extended as follows:

Event	Extension date
Expert Witness' Reports	12/15/96
Dispositive Motions (as to third party defendants)	12/16/96
Additional Witnesses (as to third-Party defendants)	1/3/97

Close of Discovery	2/21/97
Settlement Conference	2/1/97
Pretrial Memoranda	3/7/97
Exhibits	3/10/97
Objections to Depositions	3/7/97
Pretrial Conference	3/13/97 @ 2:45 p.m.
Trial	week of 3/24/97

ENTERED at Fairbanks, Alaska this 16 day of ~~November~~ December, 1996.

/s/ Jay Hodges
Honorable Jay Hodges
Superior Court Judge

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK, Plaintiff, vs. DENA' NENA' HENASH, a/k/a TANANA CHIEFS CONFERENCE, INC., et. al Defendants.	)	Case No. 4 FA-95-2745 CI

TRIAL BRIEF

(Filed Mar. 13, 1997)

COMES NOW, the Defendants Tanana Chiefs Conference, Inc., Will Mayo and Kathryn Strle to submit the following trial brief.

I. SUMMARY OF CASE

This case involves a wage claim brought against TCC by Catherine Ipalook for overtime pay during here employment as the Patient Hostel Manager for a period of approximately 14 months, between June 13, 1994 and August 19, 1995. TCC has denied liability claiming that Ms. Ipalook was an employee exempt from overtime requirements. Additionally, TCC has counterclaimed against Ms. Ipalook for an amount equal to any liability which TCC may have incurred in this matter, claiming

that Ms. Ipalook breached her fiduciary duty as a past officer of the corporation in maintaining the Manager position as an non-exempt position. In turn, Ms. Ipalook has counterclaimed against Mr. Mayo and Ms. Strle claiming that they contributed to the liability of the Corporation as current officer and employee of the Corporation.

II. OUTSTANDING MOTIONS.

The Third Party Defendants have filed two motions for dismissal (failure to state a claim & standing) and one motion for summary judgement. The Court has not ruled on this motions.

I. STATEMENT OF FACTS OF CASE

Catherine Ipalook was employed by TCC as the Patient Hostel Manager for a period of approximately 14 months, between June 13, 1994 and August 19, 1995.[1] The Patient Hostel provides lodging for patients traveling into Fairbanks from outlying villages for medical care at CAIHC and FMH. The hostel consists of 8 units used for

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[1] TCC is a consortium of 26 member tribes of Interior Alaska which contract for the provision of services to the Native people located in Interior Alaska from the Indian Health Service under the terms of the Indian Self-Determination Act. Pursuant to these contracts, TCC operates Chief Andrew Isaac Health Clinic (CAIHC), which provides direct out patient medical care to Alaska Native residents of the Interior. Additionally, TCC operates a medical contract care program to provide hospital care through Fairbanks Memorial Hospital (FMH)to the Interior IHS service unit population.

patient quarters and an apartment. The hostel is staffed by a Patient Hostel Manager, a weekend relief manager, a house keeper, and a relief housekeeper. Additionally, there are two facility management personnel that provide building maintenance services for all TCC buildings in Fairbanks, including the Hostel. CAIHC also maintains a Community Health Representative, which provides patient liaison services between the hostel and CAIHC.

The patient hostel manager works at the hostel during the day. Her primary duty is to manage the facility and supervise 2 positions plus CHR duties.[2] This meant supervising four persons: Agnes Ostlund, the weekend/relief manager, and housekeepers, Stella Hamilton, Robin Hebert, and Clara Clark. Additionally, the Manager is on call 24 hours a day between 5:00 PM Sunday and 5:00 PM Friday. The Manager is provided an apartment on the premises, as her principal residence. During the normal workweek, a housekeeper maintains a daily 6 hour shift between 9:00 am-12 (noon) and 1-3 am. During the week-end (5:00 PM Friday to 5:00 PM Sunday) a relief manager is on duty. During the week-end, housekeeping services are performed by the relief manager when necessary. Since the opening of the hostel, the manager has been treated as an salaried employee, exempt from overtime. While in this position, Ms. Ipalook was paid a salary of $1916.65 a month, plus housing.

Ms. Ipalook had previously served as the President of TCC. During Ms. Ipalook's tenure as President, TCC operated the Patient Hostel. As President of TCC, Ms.

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[2] "CHR" refers to community health representive.

Ipalook had apparently neglected to review the position in question to reclassify the position in a manner consistent with her apparent belief that the position was non-exempt for overtime purposes.

After the first months of her employment as the Patient Hostel Manager, problems began between Ms. Ipalook and her supervisor, Ms. Bessie Williams. These problems resulted in extended an grievance over the course of the following four months. A primary issue in the grievance was Ms. Ipalook's complaint that she was not accorded proper status as supervisor over the patient hostel. Ms. Ipalook won her grievance, which confirmed her status as the supervisor of the Hostel. However, TCC refused to change her supervisor, and Ms. Ipalook resigned so that she could be "in a better position to address the problems experienced on this job from my immediate supervisor as a non-employee." This suit followed.

II. CONTESTED ISSUES OF FACT

A. WAGE CLAIMS AGAINST TCC

1) *Was Ms. Ipalook an exempt employee under the terms of 8 AAC 15.910 (a supervisory employee)?* Specifically, was Ms. Ipalook

a) employed solely for the purpose of regularly assigning and directing the activities of other employees'?

b) responsible for results of the work performed by the employees supervised?

c) employed for purposes other than as stated in (a) and (b) above for periods of time exceeding 20 percent of the hours worked in the workweek?

2) *In the alternative, was Ms. Ipalook an exempt employee under the terms of 8 AAC 15.910 (executive)?* Specifically,

a) was the Patient Hostel a recognized branch, department or subdivision of TCC?

b) was Ms. Ipalook's primary duty the management of the Patient Hostel?

c) did Ms. Ipalook's customarily and regularly directs the work of two or more other employees?

d) while employed as the Patient Hostel Manager, did Ms. Ipalook have the authority to hire or fire or effect any other change in status of other employees or where her suggestions or recommendations regarding these kinds of changes given particular weight?

e) did Ms. Ipalook customarily and regularly exercise discretionary authority?

f) did Ms. Ipalook earn at least two and one half (2 1/2) the state minimum wage at the time?

g) if no to item (f) above, did Ms. Ipalook devote more than 8 hours [20%] of employment each week to activities that are not directly and closely related to the administrative, executive, or professional work?

h) if yes to item (f) above, did Ms. Ipalook devote more than 16 hours [40%][3] of employment each week to activities that are not directly and closely related to the administrative, executive or professional work?[4]

f) was Ms. Ipalook compensated on a salary basis?

B. COUNTER CLAIM AGAINST IPALOOK

(1) Did Ms. Ipalook, during her tenure as President of TCC, exercise reasonable care in supervision of the TCC personnel system to assure compliance with wage and hour laws respecting classification of the Patient Hostel Manager position for overtime purposes? Specifically, did Ms. Ipalook

a) know or otherwise make reasonable inquiry into the status of the Patient Hostel Manager position for overtime purposes?

b) if yes to (a) above, did she take reasonable steps to properly evaluate and classify the Patient Hostel Manager position for overtime purposes?

2) Did Ms. Ipalook, during her tenure as Patient Hostel manager, inform TCC of possible liability arising

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[3] Alterntively, this percentage would be 20% in the event that it is found that Ms. Ipalook was paid less than 2 1/2 times minimum wages.

[4] Definitions of administrative and professional employees are set out in 8 AAC 15.910(1) and (11)

from possible misclassification of the Patient Hostel Manager during her tenure as President of TCC for overtime purposes? Specifically,

a) did Ms. Ipalook believe or have reason to believe that the Patient Hostel Manager position was exempt for overtime purposes subsequent to her tenure as President?

b) if yes, did she have such knowledge prior to TCC incurring the liability in question?

c) if yes, did she advise TCC in a timely manner to avoid such liability?

3) If yes, to either item (1) or (2) above, did TCC sustain any damages which were directly caused by Ms. Ipalook's above described actions or the failure to act?

C. THIRD PARTY CLAIMS AGAINST MAYO & STRLE.[5]

(1) Did Mr. Mayo and Ms. Strle during their respective tenure as President and Personnel Director of TCC, exercise reasonable care in supervision of the TCC personnel system to assure compliance with wage and hour laws respecting classification of the Patient Hostel Manager position for overtime purposes? Specifically, did they

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[5] Whether these issues remain in dispute is dependant upon dispostion of Defendants' outstanding motions for dismissal and summary judgement of the third party claims [against] Strle and Mayo.

a) know or otherwise make reasonable inquiry into the status of the Patient Hostel Manager position for overtime purposes?

b) if yes to (a) above, did they take reasonable steps to properly evaluate and classify the Patient Hostel Manager position for overtime purposes?

3) If yes, to item (1) above, did TCC sustain any damages which were directly caused by their above described actions or the failure to act?

II. CONTESTED ISSUES OF LAW AND LEGAL ANALYSIS OF CONTESTED ISSUES OF LAW AND EVIDENCE.

A. WAGE CLAIMS AGAINST TCC

1) The Fact That Ms. Ipalook Occasionally Performed Non-Executive/Non-Administrative Functions Does Not Mean That She Was Not An Exempt Employee. Wage and hour regulations provide that an executive employee is an employee,

A) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized branch, department, or subdivision of the enterprise'
B) who customarily and regularly directs the work of two or more other employees;
C) who has the authority to hire or fire or effect any other change in status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;
D) who customarily and regularly exercises discretionary authority

> E) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each week and who does not devote more than 40 percent of the employees weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (1) or (11) of this section; and
> F) who is compensated on a salary basis;

8 AAC 15.910 (A)(7). It is reasonable to note that Ms. Ipalook performed some work which was non-executive or nonadministrative[6] in character. Subparagraph (E) of

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[6] The regulations define administrative employee as an employee

> A) whose primary duty consists of work directly related to management policies or supervising the general business operatons of his employer
> B) who customarily and regularly excercises discretion and independent judgement;
> C) who permorms his work under only general supervision;
> D) who is paid on a salary or fee basis;
> E) who regularly and directly assists a proprietor or an exempt executive employee of the empoloyer; and
> F) who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who earns at least two and one half times the state minimum wage per hour for the first 40 hours of employment each week and who does not devote more than 40 percent of the employees weekly hours to activities that are not directly and closely related to the work described in this paragraph or paragraphs (7) or (11) of this section.

8 AAC 15.910(A)(1)

the above paragraph establishes a so called "40 %" rule[7], which limits the amount of time a non-exempt employee may perform such duties. This rule has three important points relevant to this case.

First, the type of work which is excluded from the percentage calculation, includes all work defined in paragraphs (1) (7), and (11) which includes administrative, executive and professional work. Of particular note, some of Ms. Ipalook's duties should be considered administrative in nature, and as such, should be classified as exempt activities for the purposes of the percentage rule.

Second, the regulation makes it clear that such exempt work may be "directly or *closely* related" to executive, administrative and professional type work. Non-exempt work under the percentage rule, includes work which is strictly executive, administrative and professional type work and closely related activities. In other words, in applying the percentage test, the Court can only consider non-exempt work which is unrelated to the executive, administrative and professional duties of the position.

Third, the Court should only consider non-exempt work that is done "each week"; that is to say, the Court should consider the type of work that was within the positions regular duties *each* week. The court should not consider non-exempt work which was only sporadically or occasionally performed.

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[7] The 40% rule applies to cases where the employee's compenstion is 2 1/2 times minimum wage. In cases of a lower compensation, a 20% rule applies.

B. COUNTER CLAIM AGAINST IPALOOK

1) Whether Ms. Ipalook was a "Figurehead" Officer, Is Irrelevant. In her depositions, Ms. Ipalook explains her breach of duty of care by suggesting that she was a mere figurehead. The law does not recognize a defense that an officer or director was a figurehead as an excuse for violation of a fiduciary duty. *Golden Rod Mining Co. v Bukvich*, 92 P.2d 316, 319-320 (Mont. 1939).

An officer may, under some circumstances, rely upon others, however, the officer has a duty to become familiar with the opinion, report, or other source of advice relied upon. See 19 C.J.S. Corporations §480.

2) Termination of Position As President, Do Not Completely Terminate Fiduciary Obligations. Generally, the fiduciary obligation terminates when an officer ceases to be an officer of a corporation. However, if the inception of a transaction relates back to the actions and conduct of the officer while in office, the fiduciary duty of the officer also relates back. 3 FLETCHER, CYCLOPEDIA CORPORATIONS §860, at 276; *Comedy Cottage, Inc. v Berk*, 495 N.E. 2d 1006, 1011 (Ill. App. 1986).

3) Failure To Plead An Affirmative Defense Barrs Presentation Of The Defense At Trial. In the Court's bench ruling respecting denial of summary judgment, the Court indicated that Ms. Ipalook may present evidence respecting intervening acts of the current officers of TCC which may have relieved Ipalook of any fiduciary duty. Such a defense of intervening acts would amount to an affirmative defense governed by Civ. R. 8, which requires that such defenses be pled in answer to the complaint. Ms. Ipalook did not [plead] such an answer, and therefore

waived any such defense. *Merrill v Faltin*, 430 P.2d 913 (Alaska, 1967).

C. THIRD PARTY CLAIMS AGAINST MAYO & STRLE.

1) Impossibility Of Contribution For Actions Arising When Ipalook Was President. If Ipalook is found liable for breach of fiduciary duties while President, she may only look for contribution to officers who were in office at the time. There is no dispute that Mr. Mayo was not an officer of the TCC and Ms. Strle was not employed at TCC at the time Ms. Ipalook was President. Therefore, any contribution must arise on actions or omissions which occurred subsequent to Mr. Mayo's appointment as President, and Ms. Strle's employment.

2) An Employee Generally Does Not Owe A Fiduciary Duty To The Corporation. Much of Ipalook's claim against Ms. Strle rests upon the presumption that Ms. Strle breached a fiduciary duty owed to TCC. While this matter is pending a motion to dismiss, it must be noted again, that a mere employee does not owe a fiduciary duty to a corporation to the same degree as an officer. *Southeast Consultants, Inc. v McCrary Eng. Corp.*, 273 S.E.2d 112, 115-116 (Ga., 1980).

Respectfully submitted this 13th day of March, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Defendants
Third Party Defendants.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,

Plaintiff,

vs.

DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.

Defendant.

Case No. 4FA-95-2745 Civil

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* * *

[p. 524] employee. You would exclude the work that she was required to do, based upon her responsibility for the work – for supervising the work of the other employees. Consequently, we believe that she falls within the definition of both a supervisory and an executive employee.

Before I move on to that, I would like to address one other issue, and that is the issue of – related to the wage claim, and that is the liquidated damages. I realize that Your Honor has ruled that subsection D of 23.10.110 does

not apply in this case, because it became effective in 1995. However, I would like to point out to the court's attention a case that has been cited in this case a number of times, and that's *Bobich versus Stewart*, 843 P.2d 1232, Alaska 1992, which discussed liquidated – the nature of liquidated damages. In discussing that, the court held that prejudgment interest could not be applied to liquidated damages. What is important and relevant to this discussion, Your Honor, is why. The court held that because the plaintiff had no right to liquidated damages, prior to the entry of judgement on the underlying wage claim for overtime, that the prejudgment interest would not apply.

Under the *Bobich* case, therefore, Your Honor, the right to the liquidated damages does not arise until entry of a judgment on the underlying wage claim. In other words, Ms. Ipalook had no right to liquidated damages prior to the [p. 525] entry of judgment of this court, including her – during the period that she was employed in 1994 and 1995. The statute became effective August 22nd, 1995. This is after that date. And that her right to liquidated damages only arises at this time when the statute is effective. And we would argue that it – that the statute – the – it's a kind of a reverse relation back argument, Your Honor, in that we're arguing that the prior law would not apply because it has been amended, and the right arises now, not then.

THE COURT: So if it went the other way,. . . .

MR. WALLERI: Pardon me?

THE COURT: So in other words, if the statute wasn't in effect at the time of her employment, but later on it was amended, then she'd be entitled to liquidated

damages, right? It's the reverse. What you're saying is, the liquidated damages only attaches at the time of judgment, right?

MR. WALLERI: Right.

THE COURT: So if there was no statute for liquidated damages in effect at the time of employment,. . . .

MR. WALLERI: Correct.

THE COURT: . . . . but after the employment they amended it to include liquidated damages, you'd be entitled to liquidated damages.

MR. WALLERI: Absolutely right. Because of the nature of the damages is punitive. In other words, it is not to [p. 526] compensate the employee, it is to send a message in the future. And that – and the court has indicated that's a policy issue. And it would serve – it would not serve that purpose to have mandatory liquidated damages in a case when that was not the policy of the state.

THE COURT: Okay. Hang on a second.

MR. WALLERI: Go ahead.

THE COURT: At the time this was argued, my recollection is that you weren't the attorney that argued it,. . . .

MR. WALLERI: Right, right.

THE COURT: . . . . and the other attorney didn't concede it.

MR. WALLERI: Right, he did not.

THE COURT: Okay. So now – I mean, I don't have a problem with you raising this, but it's going to have to be – I mean, I'll certainly permit you to raise that by way of reconsideration, but it'll have to be brief, and give Mr. Hackett an opportunity to brief that issue.

MR. WALLERI: I appreciate that, Your Honor.

THE COURT: Okay.

MR. WALLERI: Now, turning to the counterclaims against Ms. Ipalook and TCC, did Ms. Ipalook, during her tenure as president of TCC, exercise reasonable care and supervision of the TCC personnel system to assure compliance with wage and hour laws, respecting classification of patient hostel manager

* * *

[p. 530] situation, he was addressing the situation, and he made a reasonable assessment. In the case of Ms. Ipalook, she didn't even attempt to address those issues at all, in any way with regards to the corporation, by her own testimony. Strikingly different behaviors for the purposes of a corporate liability claim. And so we believe that while Mr. Mayo discharged his duty, his fiduciary duties, that Ms. Ipolook did not.

Therefore, Your Honor, we would request that judgment – either a judgment on the original wage claim be entered in favor of Tanana Chiefs Conference, or in the alternative, that if judgment on the original wage claim is entered, that no liquidated damages be attached, and that we receive an offset in an equal amount against Ms. Ipalook for her violation of fiduciary duties.

THE COURT: Okay. With respect to the liquidated damages issue, the court will permit you to, you know, file a motion to reconsider, and submit briefing on that issue, depending on what the outcome of the case is, since that's an issue that was not – was conceded by prior counsel, or the other counsel, that it – the new statute wasn't in effect.

MR. WALLERI: My understanding is that he actually argued against that, Your Honor.

THE COURT: No, they conceded – Mr. Hackett pointed out that the statute was amended afterwards, then it was agreed that the statute – the amendment didn't apply.

[p. 531] MR. WALLERI: Oh, I apologize, Your Honor.

THE COURT: That's my understanding. But. . . .

MR. WALLERI: I was of a different. . . .

THE COURT: . . . . based on what you've raised today, which may or may not be viable, it's a different issue that was addressed previously that I would permit you to file, you know, a reconsideration of that specific issue, and give Mr. Hackett an opportunity to respond. Okay?

MR. WALLERI: Thank you, Your Honor. That concludes my closing remarks.

THE COURT: Mr. Hackett, any rebuttal?

MR. WALLERI: Yeah, very briefly, Your Honor. I just want to highlight a couple points that Mr. Walleri,

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IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH,
a/k/a TANANA CHIEFS
CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

COMES NOW, Tanana Chiefs Conference, Inc., defendant in the above captioned matter, to request reconsider of the application of mandatory liquidated damages in the judgment rendered by the Court, for the reasons more fully set out in the accompanying memorandum.

Respectfully submitted this 28th day of April, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENA' NENA' HENASH,
a/k/a TANANA CHIEFS
CONFERENCE, INC.
Defendant.

Case No. 4 FA-95-2745

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER APPLICATION OF MANDATORY LIQUIDATED DAMAGES.

(Filed Apr. 28, 1997)

The Court has found that Ms. Ipalook was a non-exempt employee for the purposes of the payment of overtime during her tenure as the Patient Hostel Manager for TCC. The Court awarded Ms. Ipalook $77,412.02 in compensatory damages for unpaid overtime, and an equal amount as statutory liquidated damages. TCC requests the court to reconsider its ruling awarding liquidated damages to Ms. Ipalook in the above action. In its decision, the Court held that TCC had proven that the failure to pay Ms. Ipalook overtime was made in good faith, and that the defendant had reasonable grounds for classifying the Patient Hostel Manager position as an exempt position for the purposes of overtime.

I. STATEMENT OF ISSUE: DOES THE COURT HAVE DISCRETION IN AWARDING LIQUIDATED DAMAGES.

The Alaska Wage and Hour Act, [AWHA] authorizes a Court to award liquidated damages in an amount equal to the amount of unpaid overtime recovered by a plaintiff. *See* A.S. 23.10.110(a) Prior to 1995, the law in Alaska was that liquidated damages were mandatory. *Alaska Int'l Industries, Inc. v Musarra,* 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.,* 820 P.2d 1068 (Alaska, 1991). In short, the Court lacked discretion to deny liquidated damages.

In 1995, the Legislature enacted statutory amendments which added subsections (d)-(j) now appearing in the statute. The amendments now provide Courts with the discretion with regard to the award liquidated damages in cases where the "act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060." id.

This development of AWHA on this issue mirrors the development of the federal Fair Labor Standards Act, [FSLA] which is discussed by the Court in the *Musarra,* 602 P.2d, at 1248-1249. Essentially, the original FLSA also required mandatory liquidated damages. id. In 1947, Congress amended the FLSA to allow Courts discretion in awarding liquidated damages in cases of employer" good faith" in not paying overtime. The 1995 amendments to the AWHA reflect a similat policy change in Alaskan State law. The question before the Court is whether the Court has discretion to award liquidated

damages as allowed under the 1995 amendments or whether the Court is mandated to award liquidated damages as provided in Alaska law prior to the amendments.

II. ARGUMENT

A) Introduction

Ms. Ipalook worked as the Patient Hostel Manager from June 19, 1994 to August 18, 1995. The statute in question provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act." Sec. 4, ch 37, SLA 1995 This section would appear to apply to subsections added by the bill. The bill's effective date was August 22, 1995, and it is upon this basis that Ipalook argues that mandatory liquidated damages applies.

The FSLA and the AWHA differ in a number of respects. Most notably, the policies behind the FSLA and the AWHA provisions relating to liquidated damages are substantially different. Under the FSLA, liquidated damages are considered to be a recovery "as compensation for delay in payment of sums due under the Act." *Brooklyn Savings Bank v O'Neil*, 89 L.Ed. 1296, 1324 (1945) In other words, liquidated damages are compensation for damages suffered by a worker which are too obscure and difficult to prove. id. This includes damages attributable to lost interest, which would normally be addressed through the award of pre-judgment interest under the Alaskan system. To avoid double compensation under the FSLA, pre-judgment interest is not allowable for an award of actual damages for the failure to pay overtime under the FSLA. id. Consequently, the federal courts have

held that award of liquidated damages is not punitive. *Overnight Motor Transp. Co. v Missel*, 86 L.Ed. 1682, 1690-1691 (1942).

Alaskan law notably differs on this point. Liquidated damages under the AWHA *are* punitive, and are intended as a deterrence for employers to assure payment of overtime to employees. *Alaska Int'l Industries, Inc. v Musarra*, 602 P.2d 1240 (Alaska 1979); *McKeown v Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska, 1991). In Alaska, pre-judgment interest is paid on an award of actual compensatory damages of the unpaid overtime. *Bobich v Stewart*, 843 P.2d 1232, 1237 (Alaska, 1992). On the other hand, the same Court held

> We have held that under the AWHA, liquidated damages are a form of punitive damages, not a substitute for compensatory damages. *Gore v Schlumberger Ltd.*, 703 P.2d 1165, 1166 (Alaska, 1985). Because a plaintiff has no right to use liquidated damages before they are actually awarded, an award of prejudgement interest would compensate her for a nonexistent loss. Therefore, we hold as a matter of public policy that under the AWHA, an employee may not recover prejudgement interest for liquidated damages.

id, at 1236-1237. The thrust of the *Bobich* case is two fold. First, the right to liquidated damages does not arise prior to the entry of judgment. Second, liquidated damages under AWHA are punitive and intended as a deterrent to employers. Consequently, in awarding liquidated damages, the Court must consider these factors.

B) The Statutory Savings Clause Only Relates To Vested Rights, Which Does Not Include The Right To Liquidated Damages.

With regard to the first consideration, the right to compensatory damages (unpaid overtime) relate to "wages earned for hours worked on or after the effective date" of the 1995 amendments. Clearly the right to these damages arose under operation of the pre-'95 statute. However, as noted above, the right to liquidated damages does not arise prior to the entry of judgment against the employer. *Bobich v Stewart*, supra. Clearly, Ms. Ipalook's right to liquidated damages did not arise prior to the entry of judgment in this case, which is well after the 1995 amendments to the AWHA.

At best, Sec. 4, ch 37, SLA 1995, which provides that "Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act," is a saving clause. In *Bidwell v Scheele*, 355 P.2d 584 (Alaska, 1960) the Court discussed the effect of such a saving clause on vested and unvested rights. As a general matter, repeal of a statute cannot extinguish a vested right. *id, explained at State v Kaatz*, 572 P.2d 779 (Alaska, 1977). However, where the rights in question do not vest prior to the effective date of the statutory amendments, the amendments should apply. *Bidwell v Scheele*, 355 P.2d, at 587; *State v Kaatz*, 572 P.2d, at 779.

In this case, the rights to compensatory damages vested prior to '95 amendments, and would be governed by the statute in effect then. The right to liquidated damages, however, vested at the time of entry of the

judgment – after the '95 amendments, – and would be governed under current law.

C. State Constitutional Concerns.

Such a holding is consistent with State Constitutional concerns raised by the change in the statute. Alaska Equal Protection analysis uses a single test rational basis test in reviewing State law. *Isakson v Rickey*, 550 P.2d 1 (Alaska, 1978). The test is a sliding scale which provides greater scrutiny of a statute as it may apply to fundamental rights or suspect classifications. id. However, the root concern is that a legislative action must bear a fair and substantial relation to a legitimate governmental purpose. *Commercial Fisheries Entry Comm'n v Apokedak*, 606 P.2d 1255 (Alaska, 1980).

In construing the AWHA, the Court must consider the punitive and deterrent policy goals of the liquidated damage provisions of the AWHA. In particular, the Court must consider if the mandatory application of liquidated damages to a good faith employer bears a fair and rational relationship to the legislative objective to deter willful non-payment of overtime. In this case, it clearly does not.

By its very definition, punitive awards seek to accomplish prospective goals – i.e. in this case, the deterrence of non-payment of overtime by an employer. When the state policy provided for mandatory liability for punitive damages, the legislative goal was to put all employers on notice, and coerce employers to pay overtime even, if they had a good faith believe that the employee was exempt from the payment of overtime. While this was the state legislative policy, mandatory

liquidated damages bore a fair and rational relationship to this policy.

However, there is no rational nexus between the imposition of mandatory liquidated damages to a good faith employer, when the state policy has changed. In fact, retroactive application of such mandatory damages to a good faith employer would be contrary to current state policy, which is to recognize a good faith exemption to such liquidated damages. There is no deterrent value in the prospective application of a discarded policy. Rather, such application merely gives life to the otherwise dead hand of an outmoded policy, which bears no rational relation to the legislative objectives intended by the legislature. It is clear that the Alaska legislature intended to deter the willful failure to pay overtime, rather than to punish an employer whose omissions were premised upon good faith. The application of liquidated damages to a "good faith" employer does not further the underlying policy goals of the AWHA as amended. The retroactive application of the pre-1995 statute fails to rationally relate to the purpose of AWHA as it existed prior to 1995 or in its current form.

In short, the change in policy of the AWHA severs the nexus between prospective deterrence and the legislative objective contained in the statute. Under such circumstances, the application of this policy becomes totally unrelated to the proscriptive purposes of liquidated damages to deter future employers from *willfully* failing to pay overtime, rather than the retrospective impacts of applying the pre-1995 law. Thus the change in policy renders the retroactive application of liquidated damages

constitutionally suspect under Alaskan Equal Protection analysis.

D. Recent U.S. Supreme Court Cases On Punitive Damages.

Recently, a series of decisions by the United States Supreme Court has addressed the issue of punitive damages relative to substantive and procedural due process/equal protection concerns. ~~The U.S.~~ Supreme Court has recently addressed substantive due process/equal protection concerns respecting punitive awards in several cases. The Court noted in *Pacific Mut. Life Ins. Co. v Haslip*, 113 L.Ed. 2d 1 (1991), that punitive award of a judgment may be unconstitutional excessive, but had failed to articulate a standard of constitutional review. In *TXO Production v Alliance Resources*, 125 L.Ed. 2d 366 (1993) the Court split offering several opinions with regard to substantive and procedural due process and equal protection review of the punitive damage awards. Generally, however, the opinions rejected a strict nexus between the size of compensatory and punitive damages. Of particular note was the concurring opinion of Justice Kennedy, who suggested that the focus of inquiry should not be on the size of the award, but rather the reasons for it. He stated,

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards. . . . Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational

> concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.

125 L.Ed. 2d, at 385 In short, the opinions in *TXO* address the substantive due process/equal protection concerns which, at a minimum, demand a nexus between the goal of deterrence and retribution and the award of punitive damages. In the case of the AWHA, the constitutional principal would suggest that there must be a nexus between the deterrence goal and the application of the punitive damages. But given the Court's finding that TCC was a good faith employer respecting the classification of Ms. Ipalook, the nexus between deterrence and the punitive damages seems highly suspect.

In *Honda Motor Co. [v.] Oberg*, 129 L.Ed. 2d 336 (1994) the Court addressed procedural due process concerns of punitive damage awards. In that case, the Court held that Oregon's failure to provide judicial review of an award of punitive damages was violative of the Fourteenth Amendment and Due Process Clause of the U.S. Constitution. The Court employed an analysis which compared procedures for punitive awards to traditional common law practice. In particular, the Court noted that punitive damages pose an acute danger of arbitrary deprivation of property. Traditionally, common law provided discretion with the courts to prevent arbitrary awards. id, at 349. And the Court held that judicial review, and *inter alia*, judicial discretion to review such awards was a means which common law traditionally has employed to prevent such arbitrary awards. A State legal system which deviates from judicial review of such awards, or which

severely limits meaningful judicial review in derogation of the traditional common law, is suspect.

Applying the procedural due process/equal protection analysis of *Honda*, to the Alaska AWHA, it can only be considered that the lack of judicial review and discretion raises constitutional concerns. The 1995 amendments properly apply the *Honda* principals to assure due process are addressed.

In summary, the application of mandatory liquidated damages which existed in the '95 statute, may be now be Constitutionally suspect under recent procedural and substantive due process analysis of U.S. Supreme Court.

CONCLUSION

The Court should deny the imposition of mandatory liquidated damages in this case because, the saving clause contained in the '95 amendments does not apply to unvested rights such as the liquidated damages, and that imposition of mandatory liquidated damages in this situation is constitutionally suspect under both the state and federal constitutions.

Respectfully submitted this 28th day of April, 1997

MICHAEL J. WALLERI

/s/ Michael J. Walleri
Attorney for Plaintiff

JAMES M. HACKETT, INC.
401 Eleventh Avenue
Fairbanks, Alaska 99701
(907) 456-3626

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

PLAINTIFF'S MOTION TO STRIKE PORTION OF DEFENDANT TCC'S MOTION FOR RECONSIDERATION

(Filed April 30, 1997)

COMES NOW Plaintiff, by and through counsel, and pursuant to Civil Rules 8(c), 16(f), 37(b)(2), 77(1)(2), and 95(a), moves the court to strike Sections II.C. and D. of Defendant TCC's memorandum of law in support of Defendant TCC's motion for reconsideration; and to award Ipalook reasonable costs.

This motion is supported by a review of the pleadings of record, and by the accompanying memorandum of law.

DATED at Fairbanks, Alaska this 30 day of April, 1997.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James M. Hackett
Attorney For Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30 day of April, 1997, a true and correct copy of the foregoing document was *Hand delivered* by Due Process courier service on

Mr. Michael Walleri
Legal Department
Tanana Chiefs Conference, Inc.
122 First Avenue, Suite 600
Fairbanks, AK 99701
LAW OFFICES OF JAMES M. HACKETT, INC.

/s/ J. Koloski
Jessica J. Koloski

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IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

IN THE FOURTH JUDICIAL DISTRICT

CATHERINE N. IPALOOK,
Plaintiff,
vs.
DENÁ NENÁ HENASH a/k/a TANANA CHIEFS CONFERENCE, INC.
Defendant.

Case No. 4FA-95-2745 Civil

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE PORTION OF DEFENDANT TCC'S MOTION FOR RECONSIDERATION

(Filed April 30, 1997)

Motions for reconsideration are addressed under Civil Rule 77(k) and (l). Civil Rule 77(l)(2) provides as follows:

> (2) The motion for reconsideration shall specifically state which of the grounds for reconsideration specified in the prior subparagraph exists, and shall specifically designate that portion of the ruling, the memorandum, or the

> record, or that particular authority, which the movant wishes the court to consider. The motion for reconsideration and supporting memorandum shall not exceed five pages.

Here Defendant TCC's memorandum of law is itself eleven (11) pages long. Section II.C. and D., or pages 6-11, should be stricken. The mere fact of Defendant TCC's overlength filing, which violates the plain, clear terms of Civil Rule 77(1)(2), justifies the court's striking this portion of pleading *sua sponte*.

Further, at page 6 of its memorandum, Defendant TCC attempts to raise constitutional arguments which were never previously raised in Defendant TCC's pleadings, nor at trial. As such, such arguments must be deemed waived. See Civil Rules 8(c); 16(f); 37(b)(2)(B)(C).[1]

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[1] Civil Rule 8 provides in relevant part as follows:

> (c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

Civil Rule 16 provides in relevant part as follows:

> (f) **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Civil Rule 37 provides in relevant part as follow:

> (b) **Failure to comply With Order.**
>
> (2). Sanctions By Court in Which Action is Pending . . . if a party fails to obey an order entered under Rule 16(e) of 26(b), the court in which the

Civil Rule 95(a) provides as follows:

Rule 95. Penalties.

(a) For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

CONCLUSION

The court should order Sections II.C. and D. in Defendant TCC's memorandum of law stricken; and should award Ipalook reasonable costs under Civil Rule 95(a).

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action is pending may make such orders in regard to the failure as are just, and among others the following:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

DATED at Fairbanks, Alaska this 30 day of April, 1997.

LAW OFFICES OF
JAMES M. HACKETT, INC.

/s/ James M. Hackett
James H. Hackett
Attorney For Plaintiff

* * *

[p. 551] THE COURT: The court makes the following ruling relative to the request for reconsideration. The court denies the motion to reconsider for the following reasons: Number one, during the course of our pretrial discovery, during the pretrial proceedings, it was agreed by, not Mr. Walleri, but other counsel for Tanana Chiefs was present, that when the issue was raised concerning liquidated damages, that the amendment did not apply.

Irrespective of what the court did or didn't do relative to any order concerning the withdrawal of any affirmative defenses, there were no affirmative defenses raised concerning this issue until during the course of the trial. Any motion to reconsider is untimely, based on any ruling concerning the affirmative defenses that occurred during the pretrial.

The issue concerning – this trial was tried, it was tried on the issue that the amendment did not apply, and the court does not feel it's appropriate, under the facts of this case, to grant a new trial for the limited issue of that. In any event, since it was conceded that the amendment did not apply. Furthermore, based on the *Grimes* case, the court would find that the amendment does not apply even if they're not in the concession.

The court does not find there are any constitutional issues to be addressed in any of those issues that were raised, or waived, during the course of the pretrial [p. 552] proceeding. Therefore, the court finds it does

not have any discretion, and liquidated damages are appropriate, as the court previously ruled.

* * *

[p. 546] mentioned by the TCC. I guess they have no response to it. But that's AS 01.10.100(a), and we quoted that for the court. And that says, quote, if the repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred, or right accruing or accrued under that law, unless the repealing or amending acts so provides expressly. These amendments don't do anything with the liquidated damages, they just say if the defendant – in other words, they don't wipe out liquidated damages. In fact, they actually establish a very high standard that the employer has to prove, not only good faith, as defined in the statute somewhat, and they also – the employer has to show reasonable grounds.

The employer never showed reasonable grounds in this case, and I'm not sure that the court's good faith ruling was anything more than general good faith. And I don't even know if the court was really applying the statutory good faith under the amendments.

THE COURT: That's true, Mr. Hackett. At the time that the court ruled, the issue concerning what had to be proved under the statute was not addressed by either party,. . . .

MR. HACKETT: Correct.

THE COURT: . . . . which is a clear and convincing standard.

MR. HACKETT: That's correct, Your Honor. And that –

* * *

[p. 562] November 21st, 1995.

Other than the situation concerning the objections to the findings for the first motion to amend the findings, everything else has been ruled on. And with respect to the original motion to amend findings, the – I mean, I don't think that's a major issue since, as the court indicated, that was a generic finding rather than a legal finding in terms of the good faith. I mean, I don't – as the court indicated, Tanana Chiefs was – I mean, it was good faith in the sense that they were not doing something intentional or willful; that it was not a legal finding of good faith pursuant to the statute, or the amended statute. So I don't know if that's a major issue or not.

What else do the parties need the court to resolve at this time?

MR. HACKETT: I guess the only other thing, Your Honor, would be, you know, we lodged – I guess one of the first things we lodged were proposed findings and conclusions, and. . . .

THE COURT: Well, there's some objections. Mr. Walleri filed some written objections for that.

MR. HACKETT: Right. And then so. . . .

THE COURT: And I don't know if you were going to reply or what.

MR. HACKETT: Well, under the Rule, I didn't have a – I

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[p. 561] this case, Tanana Chiefs was in fact the primary defendant in the case. The same counsel represented all three, or the defendant as well as the third-party defendants, which were joined pursuant to the claim against Ms. Ipalook, or the counterclaim against Ms. Ipalook.

It's clear that if there was in fact any type of conflict situation concerning the three, quote, defendants or third-party defendants, additional counsel should have been appointed to represent them. This is a situation where clearly the interest of all three was the same in practicality, and therefore it was – the court does not consider it was a joint offer. It is in fact a valid offer of judgment which is exceeded, and therefore the ten and a half – or the fifteen and a half percent prejudgment interest rate should apply.

The court finds further under the facts and circumstances of this case that, because of the dealings between the parties, the standing practice that had been utilized in terms of how this position was treated, that it would be unfair to Tanana Chiefs to have prejudgment interest accrue from the date of the work, rather the date of the filing of the lawsuit, which is the first notice that Tanana Chiefs had that there was a claim, should be utilized as the date the prejudgment interest should run from, which is November 21st, 1995. So prejudgment interest should run from

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